SPOTTSWOOD THOMAS
BOLLING, ET AL.,

Petitioners,

—vs.— No. 413

C. MELVIN
SHARPE, ET AL.,

Respondents.

Washington, D. C.
Thursday, December 11, 1952.

Oral argument in the above-entitled matter was resumed, pursuant to recess, at 12:10 p.m.,

BEFORE:

FRED M. VINSON, *Chief Justice of the United States*
HUGO L. BLACK, *Associate Justice*
STANLEY F. REED, *Associate Justice*
FELIX FRANKFURTER, *Associate Justice*
WILLIAM O. DOUGLAS, *Associate Justice*
ROBERT H. JACKSON, *Associate Justice*
HAROLD H. BURTON, *Associate Justice*
THOMAS C. CLARK, *Associate Justice*
SHERMAN MINTON, *Associate Justice*

APPEARANCES:

JAMES M. NABRIT, JR., ESQ., *on behalf of Petitioners—Resumed.*

MILTON D. KORMAN, ESQ., *on behalf of Respondents.*

PROCEEDINGS

MR. CHIEF JUSTICE VINSON: No. 413, *Bolling et al.*, versus *C. Melvin Sharpe et al.*

Mr. Nabrit?

ARGUMENT OF JAMES M. NABRIT, JR., ESQ., ON BEHALF OF PETITIONERS—RESUMED

MR. NABRIT: If it please the Court:

At the close of the Court's session yesterday, we were attempting to outline the basic arguments of the petitioners. Unfortunately, we only have ten minutes left, and probably we can barely outline it. We would like to address ourselves, however, to some of the questions which seem to be of concern to the Court in these cases.

MR. JUSTICE FRANKFURTER: Before you sit down, I hope you will include in your answers the answer to this question, whether during the life of this statute there came before Congress periodically or at such periods as there did come, if any, the requirement to make appropriations for the enforcement of this statute; or, since you question whether they had the duty to enforce it the way they did, for the things that the District authorities did, and whether during that period there was any legislative effort to stop these appropriations or to prohibit the authorities from doing what I understand you and your colleagues said was not authorized by this legislation.

MR. NABRIT: I would be very happy to address myself to that at this moment, Mr. Justice Frankfurter.

In looking at these statutes enacted by Congress governing the schools in the District, I should like to preface my answer by saying that the first statute passed with respect to public education in the District of Columbia was passed in 1862. Now, at the time

petitioners drafted their briefs in support of our proposition, we had taken the position that the statutes did require it, and we did set out the history. However, if the Court is interested in the history, there is in the brief filed in this case *amicus curiae* for the 18 organizations, on pages 20 and 21, some historical analysis of these statutes, which may be of help to the Court.

The Court may also take judicial notice of the Barnard Report, which is in the special report of the Commissioner of Education of the Public Schools of the District of Columbia in 1871, and in that volume at page 49 and page 267 they give the history of the public schools of the District of Columbia up to that time, and they also discuss the Act of 1864, to which I shall advert in just a moment.

MR. JUSTICE FRANKFURTER: Is that report referred to in your brief or in the *amici* brief?

MR. NABRIT: No.

MR. JUSTICE FRANKFURTER: What is the name of that report?

MR. NABRIT: The District of Columbia, the Barnard Special Report, Commissioner of Education of the Public Schools in the District of Columbia, 1871.

MR. JUSTICE FRANKFURTER: Thank you.

MR. NABRIT: That is the Government Printing Office. It does not give any other name. It is the House of Representatives.

Now, if the Court please, in 1862 this was the situation in the District of Columbia. There were a number of private schools for whites and a number of private schools for Negroes in Georgetown, Washington, and the District of Columbia. As you recall, we had not yet combined all of those into what is now the District. But for purposes of this discussion I think that the Court may take those as one.

At that time, these private schools were supported by private philanthropy. In 1862, Congress, as discussions in Congress indicated—about that there is no dispute—being concerned about the support of the schools which existed in the District for the Negroes, enacted a measure which provided that these schools should be supported by tax funds derived from taxes levied upon free Negroes.

That did not appear either to produce revenue or to be satisfactory. So Congress then enacted a statute the latter part of that year in which Congress said that these schools should be supported by funds derived from the general revenue, that is,

from the taxes of all of the inhabitants of the District. Now, this, as you recall, was in 1862, before the Fourteenth Amendment and before the actual effect of the Emancipation Proclamation.

Now, at this time the members of the legislature stated that they were concerned about what should be done for the Negroes who would be free. I think it is also fair to say to the Court that in the Barnard Report, to which I referred, the Congressmen, in presenting this to the House and stating that there had been no printed report of the proceedings, stated that they were providing no separate schools for Negroes because they had no adequate financial support, and they were concerned about the educational situation.

In 1864, the basic acts out of which grow the present acts governing the schools in the District of Columbia were enacted. They provided in substance that suitable rooms and schools should be provided for the training of the colored pupils, and in addition to that they provided mandatory legislation to ensure that a proportionate share of the funds secured from revenue in the District should be allotted to these schools. I might say to the Court that they did this because experience had shown that there was some diversion of funds that Congress had intended for these schools to the white schools.

Now, all of this is uncontroverted. There is no dispute about this.

Then, after the proposal of the Fourteenth Amendment in 1866, and after its adoption in 1868, there was, in 1874, a re-enactment of these statutes, in substance as they are found in our brief. Now, it appears to petitioners that it is the contention of the respondents that that re-enactment after the adoption of the Fourteenth Amendment was a congressional construction of these acts that they permitted separate schools, and I think that it was the issue which underlies the question of Mr. Justice Frankfurter, as to re-enactment of these statutes and as to the appropriations in respect to these acts over all these years.

MR. CHIEF JUSTICE VINSON: Do I understand that the schools were separate prior to the adoption of the Fourteenth Amendment?

MR. NABRIT: Yes, sir, they were.

MR. CHIEF JUSTICE VINSON: And at one time they taxed property separately; they taxed colored property for the maintenance of colored schools and white property for the maintenance of white schools?

MR. NABRIT: No. They did not say anything about the white schools. I should say this—

MR. CHIEF JUSTICE VINSON: The white schools were run out of general revenues?

MR. NABRIT: I presume so. I did not find that phrase. But I would answer your question by saying that they must have been supported out of the general revenue, since this special provision was made.

But I should say this, Mr. Chief Justice. At this time, public education—this is the first public education attempt in the District of Columbia—public education itself was suspect in the country, especially with these compulsory features that were attached to it, so that the least we can say is that at the beginning of public education, Congress indicated before the Fourteenth Amendment, by its support to these separate schools, that at that time separate schools existed and could exist.

MR. CHIEF JUSTICE VINSON: And in the District of Columbia, they did exist at the time of the passage and the adoption of the Fourteenth Amendment?

MR. NABRIT: That is correct.

Now, it is the petitioners' position at that stage in the history of these statutes that prior to the adoption of the Fourteenth Amendment, respondents can get no support from whatever Congress did with these schools; that they must gain their support by reason of the action of Congress thereafter. I think they joined in that position. It is therefore the position of petitioners that the action of Congress in 1874, in re-enacting these statutes, is not persuasive on this Court as to whether or not either, one, Congress intended compulsory or authorized segregation in the District, or, two, whether that is constitutional.

MR. CHIEF JUSTICE VINSON: Mr. Nabrit, in view of the questions from the bench, you may have five minutes more time, and the District may have similar time.

MR. NABRIT: Thank you.

As to the re-enactment of these statutes—

MR. JUSTICE FRANKFURTER: I did not mean to divert you on any legal implication. I wanted to know what the facts were, whether from year to year appropriations had to be made, or whether the question was raised, and whether it got through without anybody's thinking about it.

MR. NABRIT: Yes, sir. I wanted to address myself to that, but I thought you were entitled to have some background for it.

Now, specifically addressing myself—

MR. JUSTICE REED: Apparently there is no reference in the briefs to legislative history. Was there a discussion of the desirability or the undesirability of segregation in 1874?

MR. NABRIT: I do not know about 1874, but there was a discussion of it prior to 1874, in 1866 and 1864.

MR. JUSTICE REED: Was it directed toward the adoption of segregation?

MR. NABRIT: That is right. And there was considerable difference of opinion among the Negroes in the District of Columbia on that question.

MR. JUSTICE REED: I meant on the floor of the Congress.

MR. NABRIT: It was not printed, you see. So we just have to suppose that there was some discussion. I would say for the purpose of the Court, it might be assumed that there was discussion. But it was not printed.

MR. CHIEF JUSTICE VINSON: But that was prior to the adoption of the Amendment?

MR. NABRIT: That is right. And we take the position that on this particular problem, it is not persuasive to the Court.

Now, as to your specific question, Mr. Justice Frankfurter, there have been acts in support of these schools, appropriation acts, directed to the support of this separate system in the District of Columbia each year, and also in 1906 a group of citizens went before Congress to urge in the appropriation bill the adoption of more powers for the then assistant Negro superintendent.

Also, subsequent to that, there was agitation for the creation of another first assistant superintendent for the white schools and for the Negro schools; and in each of those two instances, Congress provided the money and the position, and as to the first assistant, white and colored, they wrote that into the legislation, in addition to the appropriation.

Now, as to whether or not—

MR. JUSTICE FRANKFURTER: You say they wrote into the legislation that there was to be an assistant, or deputy, superintendent for colored schools and for white schools?

MR. NABRIT: Precisely, in language as clear as that.

MR. JUSTICE FRANKFURTER: That goes back to when, you say? 1906?

MR. NABRIT: Nineteen hundred six was when they enlarged the

powers. This last act, I believe, was in 1947. I mean, this first assistant.

MR. JUSTICE FRANKFURTER: But it was in 1906 that there was explicit legislative recognition that there is such a person as a superintendent for colored schools?

MR. NABRIT: This is correct.

There is no question so far as petitioners are concerned that that type of language has persisted in the District of Columbia. And as to the enforcement, there is no question about it; the Congress has done it.

It is petitioners' position, one, that there is nothing in this language that anybody can find that compels segregation. This is clear. There is language which may be said to permit it, or authorize it. About that, men may differ. Some may think that the differences are unreasonable, in view of the language. It is petitioners' position that it does not authorize it. But if it does authorize it, to the extent that it is implemented by these respondents, it is unconstitutional action on the part of respondents.

MR. JUSTICE FRANKFURTER: You would say that providing whatever it is, x thousand dollars salary, for an assistant superintendent for Negro schools is merely a provision that if there are to be Negro schools, and if there is to be the assistant superintendent, he is to get 6,000 dollars; is that it?

MR. NABRIT: I would go further than that. I would say, since there is in the District of Columbia a system of Negro schools—I mean, I would recognize the fact that they are.

MR. JUSTICE FRANKFURTER: If you say that—

MR. NABRIT: I would.

MR. JUSTICE FRANKFURTER: I wonder if you are not saying, since there is, and Congress appropriated for it, that it recognized the right, at least, under the statute, that there should be Negro schools?

MR. NABRIT: Now, the reason I do not say that, Mr. Justice Frankfurter, is that the language of this Court in *Ex parte Endo*, when they said that wherever there is implied legislation which restricts the individual, or curtails, to use the Court's language, the individual rights of citizens, that curtailment has to be explicitly stated in clear and unmistakable language.

MR. JUSTICE FRANKFURTER: It does not touch on a constitutional point.

MR. NABRIT: Yes.

MR. JUSTICE FRANKFURTER: I wonder if it does not carry permissiveness into a clear recognition by Congress here in the situation where they provide money, because the alternative is that Congress was providing money for something that they did not authorize.

MR. NABRIT: I would say yes, and I would say that that would not change petitioners' position. In other words, I agree to that.

Now, with this other principle, I want to say—

MR. JUSTICE FRANKFURTER: In the course of these years, was there opposition to this legislation, or were there voices raised to the Congress, or objections to this? Did the issue ever come to discussion or to challenge?

MR. NABRIT: As to whether or not this system should be changed?

MR. JUSTICE FRANKFURTER: Yes.

MR. NABRIT: In the early years—

MR. JUSTICE FRANKFURTER: I am not meaning to draw any inference. I just want the facts.

MR. NABRIT: In the early years, there was such discussion. And I am also of the opinion that we may, on an exhaustive study of that question, find such language even later; and it is petitioners' position that, as this Court has said, Congress does not enact statutes, or does not deal with things in many instances, for political or other reasons; so that petitioners would not consider that persuasive.

Now, I would like to say this final thing before my time runs out, that if the Court disagrees with us, which it may, and says that these statutes compelled and authorized, and therefore this action may be constitutional, we urge the Court not to do it, because, as this Court has said, where a possible interpretation might lead into the danger of declaring a statute unconstitutional, the Court will avoid that construction.

It is our opinion that if you do hold that these statutes compelled and authorized, they would then be unconstitutional under the due process clause of the Fifth Amendment. But more than that, we suggest to the Court that they would be in violation of Article I, section 9, clause 3, as bills of attainder, not under the classical concept of a bill of attainder, but under the concept of a bill of attainder as enunciated by this Court in *United States* v. *Lovett*, and it would appear to us that denial of admission solely on the basis of race or color of petitioners to Sousa fits precisely the formula set forth by this Court in *United States* v. *Lovett.*

Now, if I have time, I will explain it. That is, in *United States* v. *Lovett*, this Court said that where Congress had named Lovett and two others in an appropriations bill and said that they should not receive funds from that until they had been recommended by the President and approved by Congress, that that was a permanent ban on employment. This Court went to the congressional discussion to find out whether they were trying to get them for disloyalty and subversive activities.

Now, we say that if this Court decides that these statutes prohibit Negroes from ever associating with whites or ever studying with whites in a white school, they have placed the same ban upon them, and they have done it without a trial, as in the other, merely because for some undisclosed crime, some status, some position, some matter of birth, appropriation, or something else in the past, these Negroes are unfit to associate with whites, and under the definition of a bill of attainder as laid down by this Court in *United States* v. *Lovett,* we suggest that there would be another danger that these acts would be unconstitutional.

Therefore, we urge upon this Court not to adopt that construction, and we say this to the Court: You would not reach the constitutionality, because if you find these statutes do not require it and do not authorize it, then the action of respondents is unlawful, and you may direct admission into Sousa Junior High School.

MR. CHIEF JUSTICE VINSON: Mr. Korman?

ARGUMENT OF MILTON D. KORMAN, ESQ., ON BEHALF OF THE RESPONDENTS

MR. KORMAN: May it please the Court:

Questions have been asked by the Court concerning the history of this legislation, and my distinguished opponent, Mr. Hayes, has thrown the gauntlet down to us to show the real reason for this type of legislation setting up a dual school system in the District of Columbia. I shall endeavor to point out to the Court the history of this legislation, and I accept the challenge of Mr. Hayes to show what the real reason for this legislation was.

In 1862, there was slavery in the District of Columbia. In April of 1862, by an Act of April 16, the Congress abolished slavery in the District. That was three and one-half years before the Thirteenth Amendment abolished it in the states.

There was a problem of doing something for these emancipated people. Up to that point, they had had no schools except some few private schools for the free Negroes. So the first enactment of Congress on May 20, 1862, was to set up a system of schools in the County of Washington. At that time, the District of Columbia consisted of three parts: the City of Georgetown, the City of Washington, and the County of Washington. They were distinct entities. The City of Georgetown had its own council, mayor and board of aldermen; the City of Washington had the same setup; the county was governed by a levy court. It appears that there were no schools of any kind, white or colored, in the county. There apparently were schools for white children, publicly supported, in the cities.

On May 20, 1862, the Congress passed an enactment which established a system of schools in the county, white and colored. It was a long act, with some 36 sections to it, and in section 35 they provided that the levy court in its discretion—apparently there were not many Negroes in the county at that time—but the levy court in its discretion might levy a tax of one-eighth of one percent on property owned by persons of color for the purpose of initiating a system of education of colored children in said county.

But I remind you that in that same act they set up for the first time a system of white schools in the county. Now, in that same paragraph 35, they said this:

> And said trustees are authorized to receive any donations or contributions that may be made for the benefit of said schools—

—that is, the schools for colored children—

> —by persons disposed to aid in the elevation of the colored population in the District of Columbia.

That was the purpose of these acts, to aid in the elevation of the colored population of the District of Columbia, and not to stamp them, as Mr. Hayes says, with a badge of inferiority, this pure racism that he speaks of. They were trying to elevate these people.

It goes on to say that:

> Said trustees shall account for those funds.

Then the next day, May 21, the Congress passed another act for the Cities of Washington and Georgetown, and with your permission I should like to read that entire Act, which is not lengthy,

because to me it shows what the purpose of this legislation was:

> Be it enacted—and so forth—
> That from and after the passage of this Act it shall be the duty of the municipal authorities of the Cities of Washington and Georgetown in the District of Columbia to set apart ten per-centum of the amount received from taxes levied on the real and personal property in said Cities owned by persons of color, which sum received from taxes as aforesaid shall be appropriated for the purpose of initiating a system of primary schools for the education of colored children residing in said Cities.
> Be it further enacted that the board of trustees of the public schools in said Cities shall have sole control of the fund arising from the tax aforesaid as well as from contributions by persons disposed to aid in the education of the colored race, or from any other source which shall be kept as a distinct fund from the general school fund.

Which I believe answers Mr. Justice Frankfurter's question.

> It is made their duty to provide suitable rooms and teachers for the number of schools as in their opinion will best accommodate the colored children in the various portions of said Cities.

Section 3 deals with the setting up of boards of trustees, which says that they shall have equal supervision over both the white and colored schools.

Section 4—this is the same Act, I remind Your Honors—

> That all persons of color in the District of Columbia or in the corporate limits of the Cities of Washington and Georgetown shall be subject and amenable to the same laws and ordinances to which free white persons are or may be subject amenable; that they shall be tried for any offenses against the laws in the same manner as free white persons are or may be tried for the same offenses, and that upon being legally convicted of any crime or offense against any law or ordinance, such persons of color shall be liable to the same penalty or punishment, and no other, as would be imposed on or inflicted upon white persons for

> the same crime or offense and all acts or parts of acts inconsistent with the provisions of this Act are hereby repealed.

Now, when we find those provisions in the same Act setting up schools for colored children and saying that they may receive funds from those who may want to help the colored race, and setting up these provisions for equal treatment of both races before the law, there can be no question of what the intention of the Congress was at that time.

On July 11, 1862, a few months later, Congress transferred to the board of trustees of the schools for colored children—of the schools for colored children—thereby creating the powers with respect to such schools vested by the Act of May 21 in the board of trustees for public schools in the cities.

By an Act of June 25, 1864, Congress established the Board of Commissioners of Primary Schools of Washington County, District of Columbia, and in section 9 thereof authorized that Board to purchase sites, erect schools, regulate the number of children to be taught in each school, and the price of tuition, and so on, and said this:

> That any white resident might place his or her child in the schools provided for the education of white children in said county, and any colored resident should have the same rights with respect to the colored schools.

It seems to me that that definitely established an intent to set up separate schools.

Then in the Act of May 21, 1862, in section 18 of that Act, they authorized the municipal authorities of the Cities of Washington and Georgetown to set apart each year from the whole fund received from all sources applicable to public education such proportionate part thereof as the number of colored children between the ages of sixteen and seventeen in the respective cities bears to the total number of children to help support these colored schools.

Then in 1871, the Congress enacted the Legislative Assembly Act, which combined the Cities of Washington and Georgetown and the county into one unit, and they transferred all these schools to the combined board of education which governed all of the schools in the two cities and the county.

A question was asked by Mr. Justice Frankfurter, I believe, as to whether or not there were any specific attacks upon this system of separate schools, and it was intimated that, while there

were some before the adoption of the Fourteenth Amendment, there were none thereafter. I specifically call the Court's attention to the fact, which is mentioned in our brief, that in the Forty-First, Forty-Second, and Forty-Third Congresses, between 1870 and 1874, there were three separate bills introduced by Senator Sumner of Massachusetts to strike down the dual school system in the District of Columbia, and they all failed of passage. The Fourteenth Amendment was adopted in 1868, and all three of these things came after that.

Specifically, I call the Court's attention to the fact that the Civil Rights Act of 1875 was debated over a considerable period during the Forty-Second and Forty-Third Congresses, although that Act is not now constitutional, having been so declared on other grounds. But the bill which became the Civil Rights Act of 1875, as originally drawn, specifically provided for the abolition of separation in the schools of the United States, in and out of the District of Columbia; but as finally enacted, the word "schools" was stricken from that Act.

So it seems to me that as late as 1875, you have a specific declaration by Congress that there shall be a dual school system in the District of Columbia.

Now, what transpired thereafter? In 1900, Congress set up a new school board, a paid school board, of seven persons, and they provided at that time for a board of education, a superintendent, and two assistant superintendents, one of whom under the direction of the superintendent shall have charge of the schools for colored children. That was the Act of June 6, 1900.

Then, in 1906, the Congress reorganized the whole school system here, and they established the present Board of Directors as it exists today. The organic Act of 1906 was debated at some length, and there were lengthy hearings on that before a Subcommittee of the Congress.

In our brief, I set forth some of the expressions of Negro leaders at that time, and I should ask the Court to please bear with me while I read some of them to you, because it seems to me that they go to the very heart of this question. We find Professor William A. Joiner—

MR. JUSTICE REED: What page is that?

MR. KORMAN: This is on page 25 of respondents' brief.

We find Professor William A. Joiner, of Howard University, addressing the Committee, and I did not include the letter which he had presented to the Committee, but I should like to read you one sentence from the letter which he handed to the Committee prior to making this statement. He says this, and this is found on

page 199 of the hearings on that bill:

> Experience in the past dating back to the first organization of the schools for colored children in the District has tended to prove that the interests of these schools are most carefully guarded by those who are most deeply interested in the children who attend them.

Then he said this:

> I think, Mr. Chairman, that that embodies the main sentiment as expressed by that organization, an organization composed of those whose minds have led them into literary pursuits and those who have given attention to the best welfare and interest of their people. It may seem strange that this particular word 'colored' or the idea of colored schools thrusts itself into this argument. I would it were not so. Facts are stubborn things, and when we deal with facts we must deal with them as they exist and not as we would they were; and so, Mr. Chairman, it becomes our province and our duty to do what we can to see that in the administration of school affairs in that most precious birthright of equality of opportunity spoken to us by President Eliot of Harvard that there will not be the slightest divergence from the division, 'unto him who needs and most unto him who needs most.'

Then Professor Lewis B. Moore, of Howard University, said this at the same hearings, and I am reading from page 26 of our brief:

> Give us what is being asked for here by the colored citizens, give us that, and we shall conduct under the guidance of the Board of Education the colored schools of the District of Columbia in such a way as to produce just as good results as are produced anywhere else in this country.

As the result of those sorts of expressions, we find this in the report on the bill, which became the Act of 1906, setting up the school board: The bill does not change the number of assistant superintendents, merely enlarging the power of the colored superintendent so that he shall, besides having jurisdiction over the colored grade schools, also have entire jurisdiction over the colored normal, high, and manual training schools. This was done at the earnest solicitation of the colored educators who appeared before

the Committee and was heartily endorsed by the superintendent of Howard University. The hearings developed that a great deal of friction had arisen between the director of high schools and the teachers in the colored high school, and to avoid this it was the unanimous opinion and desire of all who testified that not only should the colored superintendent have control, but that the colored schools in every instance should be designated as colored schools, so that no possible mistake could arise in that regard.

So in the Act of 1906, the Congress provided for a superintendent of schools and for two assistant superintendents of schools, one of whom, a colored man, should have charge of the colored schools.

That is not, however, the last expression by the Congress upon this point. As has been intimated, every year for practically ninety years there have been applications to the Congress for funds to operate these schools, and every year the justification for the appropriations has contained statements that so much is needed for colored schools, so much is needed for colored teachers, so much is needed for white schools, so much is needed for white teachers, so much is needed for new construction because the colored population has increased and we need another colored school and so forth and so forth.

In addition, in the Teachers' Salary Act of 1945, we find these expressions by the Congress:

> There shall be two first assistant superintendents of schools—

—they are now first assistant superintendents—

> —one white first assistant superintendent for the white schools, who under the direction of the superintendent of schools shall have general supervision over the white schools, and one colored first assistant superintendent for the colored schools who under the direction of the superintendent of schools shall have sole charge of all employees, classes and schools in which colored children are taught.

Not the colored schools, but the schools, classes, and employees under which colored children are taught.

The next section of that Act is:

> Boards of examiners for carrying out the provisions of the statutes with reference to the examination of teachers shall consist of the superintendent of schools and not less than four or more than six members of the supervisory or teaching staff of the white schools

> for the white schools, and of the superintendent of schools and not less than four nor more than six members of the supervisory or teaching staff of the colored schools for the colored schools.

Then in the next section:

> There shall be appointed a board of education on the recommendation of the superintendent of schools, a chief examiner for the board of examiners for white schools, and an associate superintendent in the colored schools shall be designated by the superintendent as chief examiner for the board of examiners for the colored schools.

And so on; almost identical language in the Teachers' Salary Act of 1947, two years later. And the latest expression by the Congress on that score was the Act of October 24, 1951, amending the Teachers' Salary Act, where we find in section 13—and this was one year ago, if the Court please:

> There shall be appointed by the Board of Education on the recommendation of the superintendent of schools a chief examiner for the board of examiners for white schools and a chief examiner for the board of examiners for colored schools. All members of the respective boards of examiners shall serve without additional compensation.

It seems to me that that should dispose of this question of whether or not Congress intended that there should be separate schools for white and colored children.

In addition, however, twice in the history of these acts, the United States Court of Appeals for the District of Columbia Circuit has passed upon the question. In the case of *Wall* v. *Oyster* in 1910, the court specifically said that these acts of 1862 and 1864 and so on that I read to the Court, and which were carried over into the revised statutes in 1874—the court said that they "manifest an intention by Congress that these schools shall be separate. In the case of *Carr* v. *Corning*, and *Browne* v. *Magdeburger,* decided on a joint opinion in 1950, the court came to exactly the same conclusion, the court saying:

> These various enactments by the Congress cannot be read with any meaning except that the schools for white and colored children were then intended to be separate.

Now, in the light of those decisions by the highest court of the District of Columbia—and I remind the Court that this Court has said many times that it accepts the construction of purely locally applicable statutes as decided by the highest court of the jurisdiction—in the case of the states, the interpretation by the highest court of the state is, it has been said, completely binding on this Court, and in the case of the Court of Appeals of the District of Columbia, this Court has said several times that in most instances and generally, you accept the interpretation of that court of locally applicable statutes.

I might read to you further from the expressions of leaders at the time the bill which became the Act of 1906 was being considered. There were expressions by Dr. Kelly Miller, one of the leaders of his people in this city, one of the foremost fighters for rights for the colored people. Indeed, one of the newest junior high schools for colored in the District is named after him, and he says essentially the same things that I have read to Your Honors in support of that Act of 1906.

What, then, is the situation? I say to the Court, and I say to my distinguished adversary, Mr. Hayes, these acts were not passed, this dual school system was not set up to stamp these people with a badge of inferiority. There was not this racial feeling that he speaks of with such fervor behind these acts. There was behind these acts a kindly feeling; there was behind these acts an intention to help these people who had been in bondage. And there was and there still is an intention by the Congress to see that these children shall be educated in a healthful atmosphere, in a wholesome atmosphere, in a place where they are wanted, in a place where they will not be looked upon with hostility, in a place where there will be a receptive atmosphere for learning for both races without the hostility that undoubtedly Congress thought might creep into these situations.

We cannot hide our faces and our minds from the fact that there is feeling between races in these United States. It is a deplorable situation. Would that it were not so. But we must face these facts.

We know that there have been outbursts between races north of here where there are not separate schools for white and colored. We know that these things exist, and constitutionally, if there be a question as to which is better, to throw these people together into the schools and perhaps bring that hostile atmosphere, if it exists, into the schoolroom and harm the ability to learn of both the races, or to give them completely adequate, separate, full educational opportunities on both sides, where they will be instructed on the white side by white teachers, who are sympathetic to them, and on the colored side by colored teachers, who

are sympathetic to them, and where they will receive from the lips of their own people education in colored folklore, which is important to a people—if that is to be decided, who else shall decide it but the legislature, who decides things for each jurisdiction? And I say that the Constitution does not inveigh against such a determination by the legislature.

The Fifth Amendment contains a due process clause, as does the Fourteenth Amendment. It does not, however, contain an equal protection clause. It has been said by this Court that the Congress is not bound not to pass discriminatory laws. It can pass discriminatory laws, because there is no equal protection clause in the Fifth Amendment. This Court has likewise, over a long period of time, some ninety years, said that under the Fourteenth Amendment separate schools for white and colored children may be retained.

If, therefore, this Court has said that such schools may be maintained under the Fourteenth Amendment where there is an equal protection clause, how can my friends here argue to the Court that there may not be a dual school system in the District of Columbia for such fine reasons as I have demonstrated to the Court, when there is no equal protection clause binding on the Congress of the United States?

And if there be questions concerning the long line of decisions leading up to this point where this Court has said that separation in schools is proper and constitutional, there can be no clearer statement than there was in the case of *Gaines* v. *Canada,* decided scarcely fourteen years ago, where this Court said, through Mr. Chief Justice Hughes:

> The state has sought to fulfill that obligation by furnishing equal facilities in separate schools, a method the validity of which has been sustained by our decisions.

That was the language, "a method the validity of which has been sustained by our decisions."

But then they went on to say that you cannot do it in this case because those equal facilities have to be within the borders of the state and not outside the state.

That is all that case said. But it established the principle that if there were separate but equal facilities within the state, then it was constitutional. And I say to the Court that it is conceded here by my distinguished opponents that there is no question of equality here.

You live here in the District of Columbia or its environs. You know that we have a complete system of schools here. I invite

your attention to the fact that it is so complete that we have two side-by-side complete systems of schools for white and colored, autonomous each in every respect, with one exception: one superintendent over them and a board of education laying down the policy for both systems. But from the janitor up to the first assistant superintendent, the colored schools are completely autonomous, and if we need an exhibit of what fine people they turn out, I will turn to my friend here, a product of the local schools.

What has changed the Constitution in fourteen years, since the *Gaines* case? What changes have occurred? What policy announcements have there been by the Congress?

Questions were directed to counsel all through these cases about changed conditions. Mr. Justice Burton asked counsel if it were not true that these other cases could be disposed of as being proper law at the time they were decided, but not now in the light of changed conditions.

I ask the rhetorical question: What changed conditions? What has happened in fourteen years that we did not know in 1938 when the *Gaines* case was decided? What is there now?

I submit to the Court that the answer is: Nothing is new. The Constitution is the same today as it was in 1938 at the time all these other decisions came from the lips of this Court.

It has been said here by our distinguished opponents—indeed, it has been said by the Attorney General of the United States—that Washington, this District of Columbia in which we live, is the window through which the world looks upon us. It does not seem to me that is a constitutional argument, and I should like to read something to the Court, if I may, with the Court's indulgence. This comes from this Court. After I have read it, I will tell you the case it comes from:

> No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted.

—or, if I may paraphrase by saying, "than they were intended to bear at the time of each amendment of it"—

> Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while

> it remains unaltered, it must be construed now as it was understood at the time of its adoption.

—or, if I may paraphrase, "at the time of its amendment"—

> It is not only the same in words, but the same in meaning, and delegates the same powers to the Government and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court and make it the mere reflex of the popular opinion or passion of the day. This court was not created by the Constitution for such purposes. Higher and graver trusts have been confided to it, and it must not falter in the path of duty.

That, Your Honors, was from *Dred Scott* v. *Sandford*, oh, almost one hundred years ago. But it is equally applicable today. They speak there of the civilized nations and how we look to them, just as my friends say to us here today that we must be careful; as the Attorney General says, we must be careful because the Iron Curtain countries talk about us. But he admits that they tell some lies about us. Would the change in this system stop them from telling lies if they want to tell them?

As regards the question of the applicability of the Fifth Amendment, even the Attorney General concedes that it raises a grave constitutional question when we say, "Does the Fifth Amendment control the situation?"

To some extent, I am indebted to the Attorney General for some of the things he has said in his brief *amicus curiae.* He speaks of "vexing problems which may arise in eliminating segregation," and he suggests to the Court that if you should come to the point where you should strike down separate schools in the United States then you should do it gradually over a period, which he suggests as much as fifteen years, class by class, starting in the kindergarten and going on up. Why? Because, I say to the Court, he recognizes that "vexing problems would arise in many places."

Before I leave the Fifth Amendment, there was a suggestion by Mr. Justice Jackson that there might be effect upon the Indians if this Court should hold that separate schools may not be maintained under the Fifth Amendment. And I suggest that there

are whole chapters of the United States Code which are entitled "Protection of the Indians," and under which Congress has legislated especially for them, because it is recognized that there is a people that needs protection. You and I can go out and buy a bottle of liquor if we want. The Indian cannot, nowhere in the United States. And he is a citizen. Why? Because it is recognized that it is not good for him, and he needs protection. That assumes, I know, that it is good for us.

MR. JUSTICE JACKSON: I live very close to the Seneca Reservation in New York, and I would just as soon deal with a drunken Indian as with a drunken white man, myself, under modern conditions. It may have been different in the days of scalping knives.

MR. KORMAN: Possibly so.

MR. JUSTICE DOUGLAS: Referring to the educational system in the part of the country I come from, the Indians are not barred from the public schools, but the schools on the reservations are open only to Indians, and the white man would be barred from those schools.

MR. KORMAN: That is quite a different problem, Mr. Justice. In anticipation of that question, I talked to representatives of the Indian Bureau, and I was told by them that there are some 230 schools on reservations which are restricted to Indians, and there are 19 schools off reservations which are restricted to Indians.

MR. JUSTICE DOUGLAS: That merely keeps the white man out. The public school systems of the West, at least, are open to Indians.

MR. KORMAN: That may be. But that is a state proposition, left up to the states in the individual case. If the states want to let them in and think that it will not cause a problem, that is up to the legislature of the states.

MR. JUSTICE DOUGLAS: Some of these cases are state questions.

MR. KORMAN: Perhaps.

MR. JUSTICE DOUGLAS: Not yours?

MR. KORMAN: Perhaps.

I call your attention to the fact that there is separation, I have learned, by sexes in many of the large cities of the country, not in all the schools, apparently, but in some, perhaps for some special reason. I find from the National Education Association that they have separate schools for the sexes in San Francisco, Louisville, New Orleans, Baltimore, Boston, Elizabeth, Buffalo, New York

City, even, Cleveland, Portland, Philadelphia. Such cities as those separate by sexes. Those are the things which are left to the decision of the legislature, the competent authority in each case to decide what is best for that community.

Of course, this Court has said many times that it is not concerned with the wisdom of legislation or the policy except as it is expressed in acts of Congress.

Mention has been made that there is violation of the Civil Rights Act. The two sections of the Civil Rights Act that are set forth in the complaint and in the brief for the appellants are sections 41 and 43, and in the case which first had to deal with that, a case for Indiana, the Court reviewed the Civil Rights statute at some length, and said, after reading the language of the statute:

> In this, nothing is left to inference. Every right intended is specified.

The Court of Appeals of the District of Columbia, in *Carr* v. *Corning,* came to exactly the same conclusion.

I should like to point out, with reference to the Civil Rights Act, that Mr. Justice Vinson in the case of *Hurd* v. *Hodge* pointed out the fact that the Civil Rights Act of 1866, as amended in 1970, was passed by the same Congress that submitted the Fourteenth Amendment to the states, and that that same Congress, as was pointed out in *Carr* v. *Corning*, as I pointed out to the Court earlier—that same Congress is the one which passed some of these laws setting up separate schools in the District of Columbia for the two races. How, then, can it be said that the contemporaneous thought on this by the people who made these enactments had any idea that schools were to be included in the Civil Rights Act?

In *Hurd* v. *Hodge,* there was another section of the Civil Rights Act involved, section 42 of Title 8 of the United States Code, and that dealt only with the right to hold and own real property and to transfer it and lease it and contract for it, and so on. That has no bearing on the question of the right to integrate the schools in the District of Columbia.

My distinguished opponents have taken a different tack here than they have in their brief and than they took in their petition and in the argument in the district court with regard to the provisions of the United Nations Charter. In their petition and in their brief they have said that these laws violate the provisions of the United Nations Charter. Apparently they recede from that position now, and they say only that the United Nations Charter expresses the policy of the United States. If it expresses the policy of the United States, it expresses the policy of the United States to enact legislation upon a particular subject, and that is all that it expresses.

It has been demonstrated rather clearly that the United Nations Charter is not a self-executing treaty. It is a non-self-executing treaty which must be implemented by Acts of Congress. In Article 55 of the Charter it is said:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
> A. Higher standards of living, full employment, and conditions of economic and social progress and development;
> B. Solutions of international economic, social, health and related problems; and international cultural and educational cooperation; and
> C. Universal respect for, and observance of, human rights and fundamental freedoms for all with no distinction as to race, sex, language, or religion.

All that we say in there is that we pledge ourselves in future legislation to keep these things in mind. And as set forth in our brief, the framers of that Article 55 intended only that it was to give to the rest of the world those constitutional rights which we have here in America and which they are denied. That was the purpose of it. That was the purpose expressed to the Senate of the United States when they presented this Charter to them for ratification. That was the purpose expressed to the President of the United States in the report on the Charter as it came out of San Francisco.

What is the meaning of "human rights and fundamental freedoms"? It is not defined in the Charter anywhere. "Fundamental freedom" is not defined. No one knows what it means. There has been set up a separate organization, an organization which I think is called the Council on Human Rights, which has attempted to define that term, but it has been stated specifically by Mrs. Roosevelt, who heads that, that that has no binding effect even on the General Assembly of the United Nations, much less on the signatory powers.

We bar people into this country on grounds of polygamy. Polygamy is a fundamental right and freedom in some nations. How can these things be justified together? They cannot be.

My distinguished friend, Mr. Nabrit, has said that these laws

constitute a bill of attainder. As I read the law of a bill of attainder, I shall give the definition as it comes from the leading case in the United States, *Cummings* against *Missouri,* 4 Wall. 277. At page 323 of that opinion, the Court said:

> A bill of attainder is a legislative act, which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the textbooks, judicial magistracy; it pronounces upon the guilt of the party, without any of the form or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense.

This Court has said that when it speaks of punishment, it may mean deprivation of rights, but it means deprivation of rights, civil or political, previously enjoyed, which may be punishment.

These people have never enjoyed anything which has been taken away from them. These laws which set up these schools for them were to give them something, and not to take something away from them. These laws which set up the dual school system in the District of Columbia are not to take anything from my friends and they are not to take anything from the white children. They are set up so that there will be schools which have an atmosphere wholesome to the reception of education by both races. That is the only thing that Congress has said is right for them in the District of Columbia.

They attempted to twist this word "punishment" in some way to say that they have punishment inflicted upon them by being required to go to schools to which white children are not admitted and by being denied the right to go to schools in which white children are taught. I cannot really get their reasoning. Before that, they cite some of these sociologists, some of these psychologists that have been mentioned in earlier arguments.

In this brief I have set forth a list of publications, monographs, psychological treatises, and what-not that oppose the views of the psychologists that have been named by my friends and by those in the other cases. I do not say that either one or the other is right. I take no position on that. I do not know. I am not

a sociologist. Frankly, I think the effect of that psychological testimony has been already demolished here in this Court by Mr. Davis and Mr. Moore.

I might say more upon it, but I do not think that the issue justifies further argument. I leave with the Court the citations, however, if the Court thinks that they have any merit at all.

It seems to me, Your Honors, that I have answered specifically the points which have been raised by my adversaries, and I have answered, I believe, most of the questions which the Court has put to other counsel. It seems to me, as I have listened to seven hours of argument that preceded my addressing the Court, this is the situation, that my friends say, "This is the time for a change."

MR. JUSTICE BLACK: Does that have anything to do with the law in the case?

MR. KORMAN: I do not think so, sir.

MR. JUSTICE BLACK: You do not.

MR. JUSTICE JACKSON: There has been a promise of change.

MR. KORMAN: Sir, if there has been a promise of change and it comes through the proper channels, I certainly, and the respondents certainly, have no objection to it, if it comes in the proper way by the judgment of the Congress that should pass upon it. We do not object to it. But if they decide that there is no need further for separation of the children of white and colored people in the schools so that the two may benefit from being separated because of the receptive air, the wholesome atmosphere that pervades these schools, we do not object.

Perhaps this is the time. I do not know. But I say that this is not the forum for such arguments. I say that these arguments should be made in the halls of Congress, and not in this chamber.

Incidentally, while there has been talk about breaking down segregation in all fields, I note that it has not been completely broken down in the armed forces, where it could be done by executive order, where we do not have to go to the Court and we do not have to go to the Congress. There have been some moves in that direction—and incidentally, while we are talking about progress in that direction, I should like to call the attention of the Court—and I am indebted to my friends in the *amici* briefs for this, because they have pointed to those fields wherein there has been advancement, where there is no longer segregation, and I thank them for suggesting it to me; and I have looked into it myself and I find that here in the District of Columbia Negroes are admitted to all the legitimate theaters, that they are admitted to a number of downtown moving pictures, that they are admitted to a number of

the fine restaurants, including the famous Harvey's Restaurant, that there is a gradual integration on the playgrounds, that they are admitted onto all the recreation areas, that they are accepted into many of our larger and better hotels, that they serve on the staffs of the hospitals—particularly, I call your attention to the Gallinger Hospital, which is conducted by the District of Columbia—that they take part in entertainment and in athletic contests along with white people. I say to you that even in the school system there has been a movement toward the betterment, or a breaking down, let us say, a breaking down of any of the possible feeling of hostility, the possible thought that these races cannot get along together. It has recently been ruled that mixed groups of entertainers may come into the schools and put on performances, which was denied them previously. This is not generally known, but in the southwest section there have been joint meetings called of teachers, parents and pupils, where they confer together for the betterment of their neighborhood.

Those are steps which have been accomplished without the intervention of courts, without the intervention of legislative bodies, and if those things have been accomplished, pray God the day will come when all things will be merged and the white and colored men will meet together in every place, even in the school, and it will not require even arguments from my friends before the halls of Congress, because there will be a general acceptance of the proposition that these two races can live side by side without friction, without hostility, without any occurrences. If that be so, then there will be a general movement without their taking any action to help it, without their seeking it, to bring those things about.

This legislation is now in the place where it can be handled by the Congress, and not where it will be cut off completely by this Court without power of change.

I should like to read to Your Honors what Judge Prettyman of the United States Court of Appeals said in 1950 in the *Carr* case:

> Since the beginning of human history, no circumstance has given rise to more difficult and delicate problems than has the coexistence of different races in the same area. Centuries of bitter experience in all parts of the world have proved that the problem is insoluble by force of any sort. The same history shows that it is soluble by the patient processes of community experience. Such problems lie naturally in the field of legislation, a method susceptible of

> experimentation, of development, of adjustment to the current necessities in a variety of community circumstances.

That is what I urge upon this Court, to leave this issue where constitutionally it belongs, in the body that can legislate one way or another as it finds the situation to be and as it finds the needs to be in each community. Particularly, I speak for the District of Columbia. But I say it is true in all areas. And these allusions to the Japanese cases and the other cases that they have said to Your Honors control this situation, I say they do not. In those cases, there were complete denials. Hirabayashi, Korematsu, and Endo were kept in their homes as prisoners. They were taken from their homes and put in concentration camps. Takahashi was denied the right to fish; and in the *Farrington* case, which they say is the nearest approach to their problem, there was an attempt to legislate out of existence by regulation the foreign language schools of Hawaii.

In each of these cases, there was either denial or an attempt to completely deny. These people are denied nothing. They have a complete system of education, which they admit is equal in all respects. They do not raise that issue.

I say to the Court that this issue should be left to the Congress where it belongs. There is no constitutional issue here. It has been decided by this Court. It should be left where it now is.

REBUTTAL ARGUMENT OF JAMES M. NABRIT, JR., ESQ., ON BEHALF OF APPELLANTS

MR. NABRIT: If the Court please:

I would like to adopt for the petitioners the complete argument of Mr. Korman with respect to changed conditions and to urge the Court that those changed conditions that he suggests are the very conditions that we have been saying to the Court should have a bearing upon the construction of these acts of respondents.

In the District of Columbia, contrary to the situation in the states, he has explained that the whole situation is one in which this action will create no problems, so that the question of "vexatious problems" which he mentioned does not exist in the District, and we adopt his answers to that.

Now, with respect to his statement that there is no constitutional issue, we think our brief deals with this whole argument. It appears that he does not believe that there is a constitutional issue and refuses to meet it. Giving to his argument the full meaning of it, that is, that these statutes give the authority, he has failed to deal with the question as to whether or not, conceding that they

are authorized by the statutes, that is a constitutional delegation of power, and he has not addressed himself to that.

Rather he has dwelt in the past upon the white man's burden, and he has seemed to feel that for some reason that exists today. It would appear to me that in 1952, the Negro should not be viewed as anybody's burden. He is a citizen. He is performing his duties in peace and in war, and today, on the bloody hills of Korea, he is serving in an unsegregated war.

All we ask of this Court is that it say that under the Constitution he is entitled to live and send his children to school in the District of Columbia unsegregated, with the children of his war comrades. That is simple. The Constitution gives him that right.

The basic question here is one of liberty, and under liberty, under the due process clause, you cannot deal with it as you deal with equal protection of laws, because there you deal with it as a quantum of treatment, substantially equal. You either have liberty or you do not. When liberty is interfered with by the state, it has to be justified, and you cannot justify it by saying that we only took a little liberty. You justify it by the reasonableness of the taking.

We submit that in this case, in the heart of the nation's capital, in the capital of democracy, in the capital of the free world, there is no place for a segregated school system. This country cannot afford it, and the Constitution does not permit it, and the statutes of Congress do not authorize it.

[Whereupon, at 1:27 o'clock p.m., the argument was concluded.]